

*MS. Curcio*



Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Management Systems Designers, Inc.;  
Information Technology & Applications  
Corporation; Epoch Engineering, Inc.

**File:** B-244383.4; B-244383.5; B-244383.6

**Date:** December 6, 1991

Thomas W.A. Barham, Esq., Arent, Fox, Kintner, Plotkin & Kahn, for Management Systems Designers, Inc., John R. Tolle, Esq., Barton, Mountain & Tolle, for Information Technology & Applications Corporation, and Harry Silver, Esq., Oppenheimer, Wolff & Donnelly, for Epoch Engineering, Inc., the protesters.

Paul Daniel, Esq., Ober, Kaler, Grimes & Shriver, for Institute for Systems Analysis, an interested party. Janet Bertozzi, Esq., and Arthur Rettinger, Esq., United States Customs Service, Department of the Treasury, for the agency.

Mary G. Curcio, Esq. and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest is sustained where the procuring agency failed to amend solicitation despite significant changes in its requirements; it is unclear what the outcome of the competition would have been if an amendment detailing the changed requirements had been issued and offerors had been given the chance to submit revised proposals responding to the changed requirements.

2. Where solicitation did not require offerors to bring a certain project director to the discussion sessions and the procuring agency did not tell one offeror to bring the project director but told other firms to do so, protest is sustained where the record indicates that the one offeror's best and final offer may have been adversely affected because it did not bring its project director to the sessions.

3. Protest that agency should have disclosed three evaluation subfactors because they were significant subfactors is denied where each subfactor was reasonably related to the evaluation factor under which it was considered and no subfactor was worth more than any other subfactor so that

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offerors could have reasonably anticipated the evaluation scheme.

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## **DECISION**

Management Systems Designers, Inc. (MSD), Information Technology & Applications Corporation (ITAC) and Epoch Engineering, Inc. protest the award of a contract to Institute for Systems Analysis (ISA) under request for proposals (RFP) No. CS-90-029, issued by the United States Customs Service, Department of the Treasury, for technical support services.

We sustain the protest of MSD on the ground that the agency significantly changed its requirements without amending the solicitation, and we sustain the protest of Epoch on the basis that it was not treated fairly and equally with other offerors. We dismiss the remaining issues in the MSD and Epoch protests. We deny the ITAC protest.

## **BACKGROUND**

The RFP, issued on August 1, 1990, anticipated the award of an indefinite delivery/indefinite quantity contract to the most advantageous offeror for a base year and 2 option years. The RFP was comprised of seven task areas under which Customs could place orders and provided an estimate of the total number of hours per year the contractor could expect to perform in each task area. For the base year the task areas and the estimated number of performance hours are as follows:

<u>Name of Task Areas</u>	<u>Number of Performance hours</u>
Task A--C31 System Support	14,000
Task B--Artificial Intelligence/ Expert Systems	6,000
Task C--Operations Research/Systems Analysis	2,900
Task D--Prototype Systems	7,500
Task E--Electronic Tagging/Tracking Devices and Systems	1,100
Task F--Integrated Logistics Support	8,600
Task G--Intelligence Analysis Support	7,350

The RFP also gave a list of the labor categories that would be required for each task area and the estimated number of hours per year per task order that would be required for each labor category. For example, the RFP provided that for task A a project director and a senior systems engineer each would be required to perform 2,000 hours per year. In addition, the RFP gave the estimated cost to an offeror of travel and other direct costs.

The RFP also provided the following technical evaluation factors and their weights: Personnel Qualifications (45 percent), Corporate Experience (10 percent), Project Organization (10 percent); Facilities and Equipment (10 percent); and Methodology (5 percent). Offerors were required to submit a technical proposal, and to propose an hourly rate and a total annual cost for each labor category. The RFP provided that for the purposes of award the technical factors would be worth 80 percent and cost would be worth 20 percent.

Customs received 10 proposals in response to the RFP. After the initial evaluation by the technical evaluation panel, four of the proposals, those submitted by ISA, ITAC, MSD, and Epoch, were included in the competitive range. Each of the offerors in the competitive range was requested to attend discussion sessions. Immediately prior to the discussion sessions, Customs learned that it would have funding only for task A in the base year.<sup>1</sup> The negotiation minutes show that ISA was advised during discussions that funding was available only for task A; the other offerors were only generally advised that at that time funding for certain tasks (other than tasks A and B) was unknown.

Subsequently, the agency requested best and final offers (BAFO), and on February 6, 1991, the evaluation panel met to evaluate and score the BAFOs. The evaluators initially evaluated and scored the BAFOs with respect to task A only. The agency's legal department reviewed the evaluation and determined that because the solicitation did not provide for the evaluation of task A only, the evaluators improperly evaluated the BAFOs for only task A. As a result, on March 7, the evaluators reevaluated the BAFOs, this time taking all seven task areas into consideration. After the reevaluation, ISA ranked first in technical points, ITAC ranked second, Epoch ranked third and MSD ranked fourth. The offerors' cost proposals were also evaluated. In evaluating the cost proposals, the agency, in an attempt to realistically assess the true costs of awarding the contract to any particular offeror, considered that only task A would be funded in the base year. The agency also determined that its true requirements for task A were for 24,000 hours for the base year, not 14,000 hours as stated in the

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<sup>1</sup>In its agency report, the agency failed to specify at what time in the procurement process it learned of the limited funding (task A only). The agency only stated that sometime "during the course of the procurement" funding for tasks other than task A became unavailable. In response to our further request, the agency stated that it knew of the limited funding immediately prior to the discussion sessions.

solicitation. Specifically, the agency report states that "Customs determined that, based on the level of staffing required for support of task A during the pendency of the procurement, the level of support required for task A would be, for the duration of the base year, at the rate of approximately 24,000 hours per year."<sup>2</sup> As evaluated for task A at 24,000 hours for the base year, MSD proposed the lowest cost, Epoch, the second lowest cost, ITAC, the third lowest cost, and ISA, the highest cost. When the technical and cost scores were combined, ISA was ranked first. On this basis, the technical evaluation panel recommended that the contract be awarded to ISA. The contracting officer concurred and awarded the contract to ISA. These protests followed.

#### MSD'S PROTEST

MSD protests that the agency's decision to award the contract to ISA under the solicitation as issued is improper because the solicitation did not reflect the agency's true minimum needs. MSD argues that the solicitation anticipated the award of a contract for seven task areas, while the agency evaluated BAFOs and awarded the contract knowing that it had funding for only task A. In addition, MSD states that the RFP advised offerors that they could expect to provide 14,000 hours of support for task A in the base year when, in fact, the agency's real needs were for 24,000 hours of task A support. MSD argues that once the agency became aware of these changes in its requirements it was obligated to amend the solicitation and provide all offerors the opportunity to respond to the revised requirements.

In response, Customs argues that it was not required to advise offerors of the changes in the number of tasks that would be ordered or the number of labor hours required for task A because under the indefinite quantity contract to be awarded here--which is used where the government cannot predetermine above a specified minimum the precise quantities of supplies or services that will be required during the contract period--it has flexibility with respect to both the quantities ordered and the delivery schedule. Customs argues that, in any case, while it has funding for only task A in the base year, its requirements did not change because it still "needs" support in all seven task areas.

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<sup>2</sup>We note that Customs again has not specified the exact time when it first became aware of the change in the level of staffing required for task A.

We disagree with the agency. While Customs may still literally have a "need" for support in all seven task areas, it could actually expect to procure only task A support since funding was available only for task A. Further, while an indefinite quantity contract does give the government flexibility when it cannot determine its needs above a minimum quantity in advance of contracting, the use of such a contract does not excuse the government from actually identifying its needs. See Comstock Coms. Inc., B-242474, May 6, 1991, 91-1 CPD ¶ 438.

Where the government's requirements change after RFP issuance, it generally must issue an amendment to notify offerors of the changed requirements and afford them the opportunity to respond to them. Federal Acquisition Regulation (FAR) § 15.606(a). ✓ If the competitive range has been established, all offerors in the competitive range must be provided notice of the changed requirements. One circumstance requiring the issuance of an amendment is a significant change in the government's quantity requirements. See Universal Techs., Inc., B-241157, Jan. 18, 1991, 91-1 CPD ¶ 63. Here, there was a significant change in the government's quantity requirements--the more than 30,000 hours indicated for tasks B through G no longer were to be acquired because of a lack of funds, and the task A hours were increased from 14,000 to 24,000 hours. These changes should have been communicated to all competitive range offerors through an RFP amendment. Customs' failure to issue such an amendment was contrary to FAR § 15.606(a). //

This failure may well have been prejudicial to offerors and affected the results of the competition, since offerors might have revised their technical and cost proposals if they had been made aware of the substantial change--an overall decrease in hours of more than 50 percent along with a 70 percent increase in task A hours--in requirements. For example, offerors knowing that only task A would be funded might have assigned different personnel, not needed for the other tasks, to task A, with the result that technical point scores might have been different.

In addition, we are concerned that the agency did not treat offerors equally because, as discussed above, during discussions ISA was told specifically that there was funding for only task A while the other offerors were only generally informed that funding for certain tasks might be unavailable. This may well have given ISA an unfair advantage over its competitors.

The protest of MSD is sustained. We recommend that the agency reopen the competition, issue an amendment reflecting its changed requirements and permit the four offerors in the competitive range to submit revised proposals. If Customs

then determines that an offeror other than ISA is entitled to the award, Customs should terminate the ISA contract and award a contract consistent with its new determination. We also find that MSD is entitled to recover its protest costs. 4 C.F.R. § 21.6(d)(1) (1991). Because we are sustaining MSD's protest and recommending that all offerors in the competitive range be permitted to submit revised proposals, we will not address the other issues raised in MSD's protest.

#### EPOCH'S PROTEST

Epoch argues, among other things, that Customs failed to hold meaningful discussions with the firm because Epoch's BAFO was substantially downgraded because it did not bring its task A project director to the discussion sessions when the firm was never requested to do so. Our review of the evaluation documents confirms Epoch's position. When the BAFOs were evaluated for task A during the second evaluation session, Epoch was substantially downgraded for failing to bring the project director to the discussions when, according to a statement on the evaluation, Epoch was specifically told to do so.

Epoch has provided an affidavit from its vice president who spoke with the Customs contract negotiator regarding the personnel Customs wanted to attend the negotiation session. This affidavit states that the vice president was not asked to have Epoch's task A project director present during discussions. In response, Customs did not dispute Epoch's assertion that it was not told to bring its project director or provide any additional evidence on the question. Accordingly, we find that Epoch was not told to bring the task A project director to the discussion sessions while other offerors apparently were told to do so, and that there was no requirement in the solicitation that offerors bring the project director to the discussions. Nor was there any reason for Epoch to know that the evaluators would be interested in having the task A project director present at the discussions. At the time of the discussions Epoch was not aware that only task A would be evaluated, but instead was still operating under the impression that the contract would be awarded for all seven tasks. Thus, it was entirely reasonable for Epoch to bring its program director, rather than its task A project director, to the discussions because the program director was qualified to discuss all seven tasks.

Customs argues that no prejudice resulted because the second evaluation results were not followed. Even though the proposals were reevaluated, additional discussions were not conducted and, in the reevaluation of Epoch's BAFO, the agency relied upon the earlier discussions and evaluation of

task A. We believe it is likely that Epoch was adversely affected in the final evaluation of its proposal by the absence of the project director from the earlier discussion sessions. Accordingly, we sustain Epoch's protest on this basis. In light of our recommendation in the MSD protest that Customs reopen the competition and permit offerors in the competitive range to submit revised proposals based on Customs changed requirements, we are not recommending additional corrective action. Epoch, however, is entitled to recover its protest costs. 4 C.F.R. § 21.6(d)(1).

#### ITAC'S PROTEST


In evaluating the technical proposals, Customs used subfactors that were not specifically listed in the RFP. Under factor 1, "Personnel Qualifications," the subfactors, which are equally weighted, are:

- (1) Compliance with Stated Minimum Requirements;
- (2) Additional experience/Qualifications of Key Personnel; and
- (3) Experience in the Topical Area.

ITAC argues that the agency was required to disclose these subfactors because they were not reasonably related to the factor under which they were evaluated. Citing FAR § 15.605(e) and Devres, Inc., 66 Comp. Gen. 121 (1986), 86-2 CPD ¶ 652, ITAC also argues that because the three evaluation subfactors for factor 1 were each worth 15 percent of the total available evaluation points, they are "significant" subfactors and the agency was required to disclose them in the solicitation as evaluation subfactors. FAR § 15.605(e) requires that solicitation state "any significant subfactors, that will be considered in making the source selection and their relative importance."

We find that the subfactors "Compliance with Stated Minimum Requirements," "Additional Experience/Qualifications of Key Personnel," and "Experience in the Topical Area" are clearly related to the factor "Personnel Qualifications" under which they were evaluated. In fact, it is difficult to imagine what alternative items ITAC believed would be evaluated under an evaluation factor entitled "Personnel Qualifications." We further find that the evaluation subfactors are not "significant," so that they were not required by FAR § 15.605(e) to be separately identified and their relative importance listed. In Devres, an evaluation subfactor was worth approximately 25 percent of the total score and more than the other general evaluation factors. Because its relative weight in the evaluation scheme could not have been reasonably anticipated under the solicitation scoring scheme, the subfactor was significant and offerors should

have been apprised of its importance. Here, each of the three subfactors was equally weighted, worth 15 percent of available evaluation points. We find nothing unusual or unexpected in the agency's judgment that meeting minimum qualifications, experience in excess of the minimum required, and experience in the specific area being procured would be major elements of an evaluation of personnel qualifications, which the RFP stated would be worth 45 percent of available points. Accordingly, the agency was not required to disclose the subfactors in the solicitation. ITAC's protest is denied.

  
Acting Comptroller General  
of the United States